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10-5-2017

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Recommended Citation

Julius Bodie, *Modern Imperialism in Crimea and the Donbas*, 40 Loy. L.A. Int'l & Comp. L. Rev. 267 (2017).
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Modern Imperialism in Crimea and the Donbas

JULIUS BODIE*

The diplomatic crises that have enveloped Ukraine since early 2014 threaten to transform the global political and legal order that materialized in the aftermath of Soviet Russia's dissolution. The unpredictable pattern of Russian foreign policy has resulted in the first forcible annexation of a sovereign European territory since World War II and the perpetuation of a 'hybrid war' in Eastern Ukraine's Donbas region, where pro-Russian separatists have sought to reunite swathes of captured territory as part of *Novorossya*.¹ Both of these developments can be traced to legacy Soviet influences that are embodied in President Vladimir Putin's aggressive foreign policy. However, the style and characterization of military action throughout the conflicts differ in each case. While the first conflict in Crimea involved an overt Russian military presence securing a bloodless, diplomatic circumvention of international law that has since been decried by the Western world, the conflict in the Donbas has been characterized as a hybrid war, involving a high volume of casualties and disputed reports of state sponsorship and participation that allow Russia to maintain plausible deniability about its true involvement.

Although the historical relationship among Ukraine, Crimea, and Russia is incredibly nuanced and complex in the years since Catherine the Great first annexed the peninsula in 1783, the current governing State treaties, customary international law, and domestic constitutions quite clearly undermine any legitimate basis for Russia's forcible annexation

*J.D., Loyola Law School, Los Angeles. Special thanks to Professor David Glazier and the devoted staff of the *Loyola of Los Angeles International & Comparative Law Review*.

1. THOMAS D. GRANT, *AGGRESSION AGAINST UKRAINE: TERRITORY, RESPONSIBILITY, AND INTERNATIONAL LAW 1* (Palgrave Macmillan, 2015). See also Ivan Nechepurenko, *Death of Novorossia: Why the Kremlin Abandoned Ukraine Separatist Project*, THE MOSCOW TIMES (May 25, 2015), <http://www.themoscowtimes.com/news/article/death-of-novorossia-why-kremlin-abandoned-ukraine-separatist-project/522320.html>.

of Crimea in March 2014.² In spite of Moscow's claims detailing Crimea's purported historical right of self-determination, the annexation has been condemned by several world leaders and supranational legal bodies.³ The Russian-backed separatist movements in the Donbas region of Eastern Ukraine, including the so-called Luhansk People's Republic (LNR) and the Donetsk People's Republic (DNR), have recently stalled in the achievement of their goals, with neither the Kiev government nor the separatist forces clearly in control of the disputed territories. It has been difficult to gauge the legality of this separatist movement; various media accounts have labeled it as a 'civil war,' 'hybrid war,' 'rebellion,' and 'anti-terrorist operation.'⁴ The situation in the Donbas is much more complex than Crimea – the territory is larger, the support for Russia among the population is lower, and there are no large military bases from which to launch operations. By perpetuating this quagmire, Putin has effectively destabilized Ukraine while undermining the legitimacy of President Poroshenko's regime and maintaining a high degree of deniability about Russian influence over the separatists. The mere presence of the frozen conflict in the Donbas renders it impossible for a truly whole Ukraine, with internationally recognized boundaries, to conduct itself as a sovereign polity.

This note will seek to analyze and compare the legality of Russian involvement in these two crises in Ukraine under the guiding principles of customary international law, State treaties, diplomatic pacts and domestic constitutions. In Part I, the annexation of Crimea will be shown to be illegitimate. Under at least two fundamental UN doctrines, six State treaties and diplomatic agreements, and three domestic constitutions, Russia's actions appear to be a violation of Ukraine's territorial sovereignty, as well as an illegal use of force.

While the stalemate in the Donbas region is currently characterized as a "non-international armed conflict", this paper will seek to demonstrate that in two periods of hostilities (August 2014 and January 2015), Russian military actions constituted an illegal use of force, and

2. Adam Taylor, *To understand Crimea, take a look back at its complicated history*, WASH. POST (Feb. 27, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/02/27/to-understand-crimea-take-a-look-back-at-its-complicated-history>.

3. Brad Simpson, *Self-Determination in the Age of Putin*, FOREIGN POLICY (Mar. 21, 2014), <http://foreignpolicy.com/2014/03/21/self-determination-in-the-age-of-putin>.

4. Bohdan Harasymiw, *Harasymiw on War in Ukraine: Undeclared, Unacknowledged and Unabated*, UKRAINE TRUTH (Feb. 4, 2015), <http://ukrainian-studies.ca/2015/01/29/bohdan-harasymiw-war-ukraine-undeclared-unacknowledged-unabated>.

perhaps even initiated an international armed conflict.⁵ The style of military action has differed in the Donbas from that in Crimea, however, and Part II will consider whether Russia violated international use of force and law of armed conflict standards with their actions in Illovaisk in August 2014 and Debaltseve in January 2015. While Moscow has officially denied responsibility for the actions of the separatists, evidence will show that there has been an overt Russian presence conducting military operations against the government forces of Ukraine.

The fact that the annexation of Crimea was completed in March 2014 allows for a more complete legal analysis than the on-going war in the Donbas. It was not until nearly a year after the annexation that President Putin admitted there was a Russian Special Forces operation ordered weeks in advance of the referendum.⁶ The war in the Donbas continues today and has taken the lives of over 3,500 Ukrainian servicemen and 2,300 civilians.⁷ It thus does not offer analysts the same benefit; the conflict must be viewed under a shroud of Russian denial by using evidence pulled from social media, journalists on the ground, and reports filed by international organizations. This article will offer an evaluation of the legality of Russian foreign policy under international law and seek to illuminate the potential repercussions on security and global stability effectuated by the first eighteen months of Russo-Ukrainian hostilities.

I. UKRAINE AND RUSSIA: A COMPLICATED PAST

A brief history of the longstanding relationship between Ukraine and Russia is required to be able to fully understand the complex geo-ethnic factors driving these conflicts. The strategic Crimean Peninsula has been a geopolitical focal point of European empires for centuries. The eastern *oblasts* (provinces) of Ukraine, Donetsk and Luhansk, sit on the Donets River Basin and are notable for their large coal reserves.⁸ The region was once a part of the 18th century imperial Russian territory

5. *Red Cross officially declares Ukraine civil war*, THE LOC. (Jul. 23, 2014, 5:09 PM CT), <http://www.thelocal.ch/20140723/red-cross-declares-civil-war-in-ukraine>.

6. *Putin reveals secrets of Russia's Crimea takeover plot*, BBC NEWS (Mar. 9, 2015), <http://www.bbc.com/news/world-europe-31796226>.

7. See U.N. Report, *Escalation of hostilities has exacerbated civilian suffering*, OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS (Mar. 15, 2017) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21383&LangID=E>.

8. The Editors of Encyclopedia Britannica, *Donets Basin*, ENCYCLOPEDIA BRITANNICA (Apr. 8, 2014), <http://www.britannica.com/place/Donets-Basin>.

known as *Novorossiya*, which stretched to the Black Sea.⁹ The history between the two nations dates back to the 1654 Treaty of Pereiaslav, and since then Ukraine has only enjoyed statehood independent from Russia during periods of war or revolution – e.g., the final days of World War I in the wake of the 1917 Russian Revolution, and then in the period surrounding the dissolution of the USSR.¹⁰

The Hetmanate was a 17th century militocracy that at its peak encompassed about half of modern Ukraine as well as parts of Russia and Poland. Although it was crushed by the Russian Empire, the Cossack warriors who defended Ukraine's independence left behind a distinctive folklore and Ukrainian identity.¹¹ The process, which created the borders of modern Ukraine, was a result of Russian geopolitical expansion in the 18th and 19th centuries. Tsarist Russia consistently warred with the Ottoman Empire from its territory on the north coast of the Black Sea.¹² In 1783, Catherine the Great declared she was protecting ethnic Russians in Crimea from the Ottoman Empire and annexed the territory.¹³ Through war, colonization, and the ethnic cleansing of the Muslim population, the Crimean peninsula became a vital part of the Russian empire.

In the early decades of the 19th century, the Tsar set up a university in the Ukrainian capital of Kiev to develop Ukrainian nationalism in order to reduce Polish influence in the region.¹⁴ Instead, it led to the emergence of a nationalist revolutionary fervor that subsequently attracted severe persecution from the Tsar.¹⁵ The students at the University of Kiev played a significant role in these movements, so in the late 19th century the Russian government prohibited Ukrainian from being spoken by

9. Christian Caryl, *Novorossiya is Back From the Dead*, FOREIGN POLICY (Apr. 17, 2014), <http://foreignpolicy.com/2014/04/17/novorossiya-is-back-from-the-dead>.

10. Charles Emmerson, *Ukraine and Russia's History Wars*, HIST. TODAY (Mar. 4, 2014), <http://www.historytoday.com/charles-emmerson/ukraine-and-russia's-history-wars>; see also *Pereiaslav Treaty of 1654*, ENCYCLOPEDIA OF UKRAINE (2001) <http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CP%5CE%5CPereiaslavTreatyof1654.htm>.

11. Katya Gorchinskaya, *Revolutions Without Benefits*, THE AM. INT. (Dec. 1, 2015), <http://www.the-american-interest.com/2015/12/01/revolutions-without-benefits>.

12. Emmerson, *supra* note 10 at 3.

13. Christopher Spencer, *Ukraine Crimea Crisis: The History*, THE GUARDIAN (Mar. 4, 2014), <http://guardianlv.com/2014/03/ukraine-crimea-crisis-the-history>.

14. David Keys, *Complex Crimea: the history behind the relationship between Russia and Ukraine over Crimea*, BBC HIST. MAG. (May 2011), <http://www.historyextra.com/feature/complex-crimea-history-relationship-Russia-Ukraine-Crimea>.

15. Richard Antony French, *Kiev*, ENCYCLOPEDIA BRITANNICA (Dec. 2015), <http://www.britannica.com/place/Kiev>.

teachers in the classroom and banned educational, scholarly, and religious publications in Ukrainian.¹⁶

The European powers of the mid-19th century, led by Britain, feared continued Russian expansion east, particularly now that they had a major naval base in Sevastopol on the Black Sea.¹⁷ In response, they attempted to shore up the Ottoman Empire's buffer zone between Western Europe and Russia by closing the Bosphorus and Dardanelles to all warships (and thus closing access to the Mediterranean).¹⁸ This sparked the 1854 Crimean War, where the Anglo-French-Ottoman force destroyed Sevastopol and humiliated Tsar Nicholas' army.¹⁹ Although the key port towns of Crimea were returned to Russia, the peace agreement established that Russia would not maintain any naval or military bases on Black Sea, greatly weakening Russia as a threat to the Ottomans or Western Europe.²⁰

World War I was devastating for Russia. Of the nearly 10 million troops mobilized, over a third were wounded or killed.²¹ After a period of mass surrenders and desertions, the Russian Bolshevik Revolution of 1917 overtook the incompetent tsarist regime and the Provisional Government that followed the Tsar's abdication. While the fledgling Bolshevik government engaged in peace negotiations with Germans, in Ukraine, a "governing council" known as the Rada was having trouble with the local Bolshevik movement.²² Germany, with forces near the region, acted first and effectuated the authority of the Rada by supplying food and aid to its supporters.²³ Germany then forced the Bolshevik government to sign a treaty that recognized the independence of Ukraine.²⁴ German forces entered Kiev in March 1918 and proclaimed Ukraine to be a sovereign State.²⁵ Yet soon after, Imperial Germany collapsed, and a civil war engulfed much of Russia, with Crimea changing hands several times over the next three years.²⁶ In 1921, the

16. *Id.* See also Walter G. Moss, *The 20 Things You Need to Know to Understand What's Happening in Ukraine*, HIST. NEWS NETWORK (Apr. 28, 2014), <http://historynewsnetwork.org/article/155451>.

17. William R. Polk, *What's Behind the Conflict between Russia and Ukraine?*, HIST. NEWS NETWORK (Dec. 21, 2014), <http://historynewsnetwork.org/article/157941>.

18. *Id.*

19. *Id.*

20. *Id.* at 8.

21. *Id.*

22. *Id.* at 9.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

Ukrainian Soviet Socialist Republic was established and the autonomous Crimean Republic was recognized as a homeland for the Crimean Tatars; both officially as part of the Russian Soviet Federative Socialist Republic (RSFSR).²⁷ However, western Ukraine became part of the newly constructed state of Poland.²⁸

The darkest period of Ukrainian history may have been the 1930s when Soviet leader Joseph Stalin orchestrated mass executions and perpetuated a state-induced famine, known as the Holodomor, which killed as many as ten million people.²⁹ Afterward, millions of Russians and other nationalities were forcibly transported to repopulate the resource-rich eastern regions.³⁰ Consequently, World War II was critical for Ukraine as it served as a buffer zone between the German *Wehrmacht* and the Russian heartland.³¹ Nearly one-sixth of the Ukrainian population died during the war, totaling over 5.3 million.³² When the Nazis and Soviets divided Poland in 1939, they reunited Western Ukraine with Eastern Ukraine.³³ This agreement eventually fueled Ukraine's later desire for nationhood.³⁴

During the war, Ukraine was a prime economic target of Germany as the "bread basket" of Russia.³⁵ When the Germans captured Kiev, they siphoned off food and shipped 2.5 million Ukrainians to German slave labor camps.³⁶ Stalin also ordered the deportation of the 200,000 Muslim Crimean Tartars.³⁷ Tens of thousands of ethnic Russians were then settled on the peninsula.³⁸ At this point, while geographically considered an extension of Ukraine, the ethnopolitical ties of Crimea were overwhelming with Russia. In the closing days of WWII, Stalin chose Yalta in Crimea as the place for the Allies to redraw the map of Europe.³⁹ Less than a decade later, Ukraine-born USSR leader Nikita Khrushchev

27. See Serhy Yekelchuk, *The Ukrainian Crisis: In Russia's Long Shadow*, OHIO ST. U. ORIGINS (Jun. 2014), <http://origins.osu.edu/article/ukrainian-crisis-russias-long-shadow>. See also Keys, *supra* note 14.

28. See Moss, *supra* note 16, at 5.

29. See Theunis Bates, *Ukraine's Fraught Relationship with Russia: A Brief History*, THE WK. (Mar. 8, 2014), <http://theweek.com/articles/449691/ukraines-fraught-relationship-russia-brief-history>; See also Moss, *supra* note 16.

30. See Bates, *supra* note 27.

31. See Polk, *supra* note 17.

32. *Id.*

33. See Yekelchuk, *supra* note 25.

34. *Id.*

35. See Polk, *supra* note 17.

36. *Id.*

37. See Keys, *supra* note 14.

38. See Yekelchuk, *supra* note 25.

39. See Polk, *supra* note 17.

transferred Crimea to the Ukrainian Soviet Satellite Republic in celebration of the anniversary of the 1654 Pereiaslav Treaty.⁴⁰ At the time, it was impossible to know that Ukraine's borders would one day become sovereign international borders.

Geo-ethnic factions could still be seen in the makeup of the country with the formal dissolution of the USSR in 1991 and recognition of Ukraine's declaration of independence.⁴¹ The western part of Ukraine leaned towards the European Union, whereas the industrial southeast consisted of Russian-speaking pro-communist factions of nostalgic Kremlin supporters.⁴² In its brief period of post-Soviet independence, Ukraine has been wrought with political corruption and a comprehensive need for economic reform. Ethnic and political tensions have perpetuated several regime changes, particularly in the past decade as pro-Russia and pro-European regimes seemingly exchanged places in Kiev.

In spite of the growing desire for European integration in Ukraine in the early 2000s, pro-Russian candidate Viktor Yanukovich (born in Soviet Ukraine's Donetsk oblast) won the 2004 presidential election.⁴³ However, reports of massive election fraud and rigged ballots spurred mass protests in Kiev and other major western cities in what came to be known as the Orange Revolution.⁴⁴ Viktor Yushenko, a pro-European candidate who had been the victim of an attempted assassination via poisoning during the election campaign won the second monitored election run-off.⁴⁵ Putin openly sided with the defeated regime in the aftermath of the Orange Revolution, perpetuating the imperial Russian past and further dividing Ukraine's eastern and western factions.⁴⁶ The failure of the subsequent pro-West leaders resulted in Yanukovich's comeback, and in 2010 he was elected president.⁴⁷

The key to this complex history is that there are two competing narratives of the Russo-Ukrainian imperial rise and fall: a distinct, differing Ukrainian view and a Russian view. To Russia, Ukraine has lost perspective of the two countries' shared history and no longer

40. See Spencer, *supra* note 13.

41. See Yekelchuk, *supra* note 25.

42. *Id.*

43. See Stuart Williams, *Ukraine's 'Orange Villain' seeks last laugh*, THE TELEGRAPH (Jan. 12, 2010), <http://www.telegraph.co.uk/expat/expatnews/6973451/Ukraines-Orange-villain-seeks-last-laugh.html>.

44. *Id.*

45. *Id.* See also Yushenko and the poison theory, BBC NEWS (Dec. 11, 2004), <http://news.bbc.co.uk/2/hi/health/4041321.stm>.

46. See Yekelchuk, *supra* note 25.

47. *Id.*

cherishes their supporting role in Russia's greatness.⁴⁸ Ukrainians have embraced a narrative based in national independence and resistance to imperial domination by Moscow. While the 1939 incorporation of Western Ukraine into the Soviet Union is seen by Russia to be a reunification of a lost territory, Ukrainian nationalists see it more as the beginning of a 50-year Soviet occupation that ended in 1991.⁴⁹ With this nuanced history in mind, the last few years of political and military crises can now be analyzed in detail.

II. RUSSIA'S ANNEXATION OF CRIMEA

A. Background

Several major events prefaced the 2014 annexation of Crimea that will help shed light on Russia's reasons for violating Ukraine's territorial sovereignty. In November 2013, public support began to grow for anti-government protests throughout western Ukraine, with the most public demonstrations occurring in the capital city of Kiev at Maidan Nezalezhnosti or "Independence Square."⁵⁰ The pro-Moscow President Yanukovych had a longstanding history of corruption, repression and anti-Western policies which stood at odds with Ukrainian popular sentiment.⁵¹ When he refused to sign a Trade Association Agreement with the European Union that would create closer economic ties between Ukraine and Western Europe, protests in Kiev grew larger, more radical in opposition to the regime, and eventually more violent.⁵² On February 20, 2014, these protests reached a boiling point as eighty-eight people were killed in forty-eight hours, including some by uniformed snipers shooting protestors from rooftops.⁵³ Two days later, President Yanukovych fled Ukraine after protest leaders and other members of the Ukrainian political elite agreed to form a new government and hold fresh elections.⁵⁴

48. See Emmerson, *supra* note 10.

49. *Id.*

50. See Adam Taylor, *Why Ukraine is So Important*, BUS. INSIDER (Jan. 28, 2014), <http://www.businessinsider.com/why-ukraine-is-so-important-2014-1>.

51. See Maxim Tucker, *Ukraine pro-EU protests: 'It's not a rally, it's a revolution'*, THE IND. (Dec. 2, 2013), <http://www.independent.co.uk/news/world/europe/ukraine-pro-eu-protests-police-forced-to-flee-as-demonstrators-take-over-central-kiev-8975954.html>.

52. See Lizzie Dearden, *Ukraine Crisis: A timeline of the conflict from the Euromaidan protests to MH17 and civil war in the east*, THE IND. (Sept. 2, 2014), <http://www.independent.co.uk/news/world/europe/ukraine-crisis-a-tim...-the-euromaidan-protests-to-mh17-and-civil-war-in-the-9706999.html>.

53. *Id.*

54. *Id.*

On March 16, 2014, a referendum on the status of the Ukrainian territory of Crimea was held.⁵⁵ Two choices were proffered to the citizens of Crimea: either restore the 1992 Crimean constitution and its status as a territory of Ukraine, or formally sever ties to Kiev and join the Russian Federation.⁵⁶ According to the Russian state media, voter turnout was 81.3%, and 96.7% of the votes were cast in favor of annexation by Russia.⁵⁷ Within three days, President Putin signed an Executive Order recognizing an autonomous Republic of Crimea, and concluded a treaty on the accession of the Republic of Crimea to the Russian Federation.⁵⁸ The conflict was spurred by the so called “Euromaidan” (referencing the protests in Kiev’s Maidan Square) and the preceding months of protests leading to a change of regime in Kiev.⁵⁹

On February 27, pro-Russian militias seized government headquarters and parliament in Ukraine’s Crimea peninsula, raising the Russian flag over two buildings in the capital city, Simferopol.⁶⁰ Throughout the next week, armed men in military uniform, lacking any insignia (referred to as “little green men” by Western press and the “polite men” by Putin) made their presence known throughout key Crimean cities, government buildings, and airports.⁶¹ The Kremlin initially denied the presence of overt Russian military, but as masked gunmen surrounded Ukrainian military installations and administrative buildings, it became more difficult for Russian authorities to maintain any plausible deniability of involvement. At the time, Moscow referred to the paramilitary presence as “self-defense” groups, but later Putin admitted that there was indeed Russian Special Forces acting in an operational capacity.⁶² Some of these soldiers were already present at the naval base in Sevastopol under previous basing agreements. However, they were

55. See Grant, *supra* note 1, at 19.

56. *Id.* at 16.

57. *Id.* at 17-18.

58. *Id.* at 19-20.

59. Dearden, *supra* note 50.

60. See Heather Saul, *Ukraine crisis: Armed men hoist Russian flag after seizing Crimea Parliament*, THE IND. (Feb. 27, 2014), <http://www.independent.co.uk/news/world/europe/ukraine-crisis-armed-men-hoist-russian-flag-after-seizing-crimea-parliament-9156413.html>.

61. Vitaly Shevchenko, “Little Green men” or “Russia invaders”?, BBC NEWS (Mar. 11, 2014), <http://www.bbc.com/news/world-europe-26532154>.

62. Aleksander Vasovic & Mike Colle-White, *Crimea prepares for referendum under heavy military presence*, REUTERS (Mar. 15, 2014), <http://www.reuters.com/article/2014/03/15/us-ukraine-crisis-crimea-idUSBREA2E09R20140315#hWXScmfuR1XFKkOx.97>; Putin reveals secrets of Russia’s Crimea takeover plot, BBC NEWS (Mar. 9, 2015), <http://www.bbc.com/news/world-europe-31796226>.

deployed throughout the territory and seized effective control of the region by the time of the referendum.⁶³

B. Annexation

The day after the referendum was held, the Russian President passed an executive order that recognized “the Republic of Crimea as a sovereign and independent state, whose city of Sevastopol has a special status.”⁶⁴ On March 18, he announced the “Crimean State Council” and the “Sevastopol Legislative Assembly” had proposed joining the Russian Federation, and signed an executive order titled “*On Executing the Agreement on Admission of the Republic of Crimea into the Russian Federation.*”⁶⁵ On March 19, a bill “*On Accession of the Republic of Crimea to the Russian Federation and the Creation of New Constitution Entities within Russia*” was submitted to the State Duma, the lower house of the Russian legislature.⁶⁶ The annexation was formalized in Russian law in the Federal Constitution on March 21, 2014.⁶⁷

No domestic Ukrainian law or treaty between Russia and Ukraine allowed for a transfer of territory; no negotiation occurred between the State governments or the putative authorities of Crimea; and Ukraine did not accede to any separation of Crimea from its territory.⁶⁸ In fact, the Ukrainian parliament formally declared the referendum to be void and legally invalid.⁶⁹ Since that time, Crimea’s annexation has been decried by multiple international organizations (e.g., The Council of Europe, European Union, Organization for Security and Cooperation in Europe, NATO, UN General Assembly), nearly all of Europe, and the United States.⁷⁰ The proceeding analysis will explain how this annexation was a violation of Ukraine’s territorial integrity and an illegal use of force under various UN doctrines, customary international law, international treaties, and domestic constitutions.

63. See Grant, *supra* note 1, at 7.

64. *Id.* at 19.

65. *Id.* at 19-20.

66. *Id.* at 20.

67. *Id.* at 20.

68. *Id.* at 23.

69. *Id.* at 17.

70. Jari Tanner, *Europe lawmakers condemn Russian action in Crimea, Ukraine*, ASSOCIATED PRESS (July 9, 2015), <http://bigstory.ap.org/article/1786f6bca6eb4e4b99e4581034e5ffd0/europe-lawmakers-condemn-russian-actions-crimea-ukraine>.

C. UN Doctrines

The internationally recognized guidelines for the use of force can be found in Article 2(4) of the UN Charter. The UN Charter was agreed upon in the immediate aftermath of World War II and was intended to be a foundational treaty governing relations between States.⁷¹ Article 2(4) is the governing principle for the use of force, requiring all members to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”⁷² The presence of masked militia and deployment of thousands of troops in the sovereign territory of another State, on the eve of a critical political referendum, thus appears to be in violation of the type of force prohibited in Article 2(4).

In 1970, a UN General Assembly Resolution, the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* was passed, affirming the vital Charter principles of territorial sovereignty and respect of State boundaries.⁷³ After Russia vetoed the UN Security Council draft resolution denouncing the annexation, the UN General Assembly considered the conflict.⁷⁴ The General Assembly referred to the 1970 Declaration on Friendly Relations in their non-binding resolution published March 27, 2014 entitled “Territorial integrity of Ukraine.”⁷⁵ The 1970 resolution is recognized as a fundamental source of international law, and the 2014 resolution reaffirmed that

“the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force, and that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or of its political independence is incompatible with the purposes and principles of the Charter.”⁷⁶

71. U.N. Charter, art. 2, ¶ 4, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

72. *Id.*

73. Sergey Sayapin, *The United Nations General Assembly Resolution 68/262 In the Context of General International Law*, 2 EUR. POL. & L. DISCOURSE VOL 19, 19 (2015) http://www.academia.edu/11807900/The_United_Nations_General_Assembly_Resolution_68_262_in_the_Context_of_General_International_Law.

74. *See generally Backing Ukraine's territorial integrity, UN Assembly declares Crimea referendum invalid*, UN NEWS CENTRE (Mar. 27, 2014), <http://www.un.org/apps/news/story.asp?NewsID=47443#.Vle6x9AqhAQ>.

75. *See Sayapin, supra* note 69, at 26.

76. *Id.* at 23.

Although UN General Assembly resolutions are not binding, they reflect existing customary international norms or treaty law.⁷⁷ Additionally, though the UN Charter dictates that the Security Council bears the “primary responsibility” for maintaining international peace and security, UN Security Council member, Russia, is currently a direct participant in the conflict.⁷⁸ Thus, the General Assembly’s consideration of the Crimea issue may hold more legal significance, particularly as it appears to be focused on reaffirming existing principles of State sovereignty.⁷⁹ Again, Russia’s actions in Crimea seem to fit into this prohibited category of “use of force” aimed at the “disruption of national unity and territorial integrity of a State.”

The crime of aggression was not initially codified into the UN Charter in 1945 because member States had trouble agreeing on a definition or conditions of “aggression,” since no such crime existed at the time the Charter was drafted.⁸⁰ In 1974, General Assembly Resolution 3314 on the Definition of Aggression was passed, and it included “...any annexation by the use of force of the territory of another State or part thereof.”⁸¹ While aggression was listed as a crime in the 1998 Rome Statute, which established the International Criminal Court, the 1974 definition of aggression was not codified into the Statute until 2010 at a review conference in Kampala.⁸² Both the Russian Federation and Ukraine are signatories to the earlier treaty, but are not parties to the updated 2010 articles.⁸³ Article 8 *bis* of the updated Rome Statute referred to the 1974 GAR 3314 to help define crimes of aggression, including using its explicit language in section 2(a), which mandates that States refrain from “any military occupation, however temporary,...or any annexation by the use of force of the territory of another State.”⁸⁴ However, the crime of aggression cannot be a charge levied against Russia as it is not yet a State party to the updated procedural language.

Although it is unclear how a “crime of aggression” will be fully prosecuted, and could not be done so until after 2017, the newly

77. *Id.* at 20.

78. *Id.*

79. *Id.*

80. See Grant, *supra* note 1, at 12.

81. *Id.* at 12.

82. *The Crime of Aggression*, COALITION FOR THE INT’L CRIM. CT., <http://www.iccnw.org/?mod=aggression> (last visited Dec. 2015).

83. See generally *The Rome Statute in the World*, COALITION FOR THE INT’L CRIM. CT. (Nov. 10, 2011), https://www.iccnw.org/documents/signatory_chart_Nov_2011_EN.pdf.

84. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 8 *bis* 2(a) (2010), <https://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/romestatutengl.pdf>.

incorporated crime of aggression cannot apply to Russia as it currently stands today.⁸⁵ Thus, while the use of force in Crimea does appear to violate Article 2(4) of the UN Charter and the non-binding 1974 definition of aggression, Russia does not appear to be liable for a crime aggression as it is currently defined. However, this does not legitimize the violation of territorial sovereignty or use of force that the UN General assembly condemned.

D. State Treaties, Diplomatic Pacts, and International Agreements

Russia's annexation of the Crimean peninsula is a demonstrable violation of several major international treaties and agreements to which the Soviet Union or the Russian Federation were signatories: the 1975 Helsinki Accords and the Conference on Security and Cooperation in Europe Final Act; the 1991 Belavezha Accords; the 1994 Budapest Memorandum; the Statute of the Council of Europe (which Russia joined in 1996); the 1997 bilateral Treaty of Friendship; and the 1997 Partition Treaty on the Status and Conditions of the Black Sea Fleet. Each of these pacts emphasized respect of Ukraine's territorial sovereignty in one form or another, and each was violated by Russia's political and military actions in Crimea in March 2014.

Both Ukraine and Russia are signatories to the Final Act of the Conference on Security and Cooperation in Europe (CSCE), adopted as part of the 1975 Helsinki Accords.⁸⁶ The act sought to promote the Cold War era policy of détente between East and West, and outlined vital principles of European State sovereignty, the inviolability of borders, and noninterference in the domestic affairs of other states.⁸⁷ It mandated that States shall refrain from "any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State."⁸⁸ Signed by thirty-five countries, the accord was actually seen at the time as a diplomatic victory for Moscow.⁸⁹ This is because the agreement appeared to legitimize Soviet suzerainty across Eastern Europe and prevented any prospective challenge to its vast territorial borders. However, the Helsinki Accords now sanctify post-Cold War borders and

85. See generally *The Crime of Aggression*, *supra* note 78.

86. Spencer Kimball, *Bound by Treaty: Russia, Ukraine, and Crimea*, DEUTSCHE WELLE (Mar. 11, 2014), <http://www.dw.com/en/bound-by-treaty-russia-ukraine-and-crimea/a-17487632>.

87. Brian Whitmore, *RIP Helsinki Accords*, RADIO FREE EUR. (Jul. 30, 2015), <http://www.rferl.org/articleprintview/27161370.html>.

88. Jean-Dominique Giuliani, *Russia, Ukraine, and International Law*, FOUND. ROBERT SCHUMAN (Feb. 17, 2015), <http://www.robert-schuman.eu/en/doc/questions-d-europe/qe-344-en.pdf>.

89. Whitmore, *supra* note 83, at 2.

protects the inviolability of Moscow's former satellite states.⁹⁰ Article IV of the Accords prohibits States from "making each other's territory the object of military occupation, or other direct or indirect measures of force...no such occupation or acquisition will be recognized as legal."⁹¹ Thus, Russia's military deployment in Ukraine and annexation of Crimea appears to be a violation of Ukraine's territorial sovereignty and therefore the Final Act of the Helsinki Accords.

The 1991 Belavezha Accords accompanied the break-up of the USSR and the creation of the succeeding entity, the Commonwealth of Independent States.⁹² The dissolution was prompted by a secret agreement between the presidents of three out of the fifteen Soviet republics, Russia, Ukraine, and Belarus.⁹³ The agreement was conducted behind the back of the Soviet president Mikhail Gorbachev, and the parties agreed to accept and respect the territorial integrity and the inviolability of each State's borders.⁹⁴ President Putin has belittled this agreement as a betrayal of ethnic Russians, stating that "millions of Russians went to bed in one country and woke up in another."⁹⁵ In December 1991, eight more former Soviet republics joined the treaty.⁹⁶ While there is debate about the legal legitimacy of the Accords, as a party to the agreement, the Russian Federation was in violation of its terms when its military deployed throughout Crimea and subsequently annexed the region in March 2014.

In December 1994, a non-nuclear proliferation agreement was concluded among Russia, the United States, the United Kingdom, and Ukraine⁹⁷ The Budapest Memorandum on Security Assurances resulted in Ukraine yielding possession of its 1,800 nuclear warheads in exchange for international guarantees of its borders, including Crimea.⁹⁸ The agreement prohibited uses of force against the territorial integrity or political independence of Ukraine, Belarus and Kazakhstan, all former

90. *Id.* at 3.

91. The Final Act of the Conference on Security and Cooperation in Europe art. IV, Aug. 1, 1975, 14 I.L.M. 1292, <http://www1.umn.edu/humanrts/osce/basics/finact75.htm>.

92. *The Belavezha Accords signed*, PRESIDENTIAL LIBRARY (Dec. 8, 1991), <http://www.prlib.ru/en-us/history/Pages/Item.aspx?itemid=749>.

93. *See generally Id.*

94. *Id.*

95. *See* President Vladimir Putin, Address at the Kremlin (Mar. 18, 2014), <http://en.kremlin.ru/events/president/news/20603>.

96. *See The Belavezha Accords signed*, *supra* note 88.

97. *See generally* Budapest Memorandums on Security Assurances 1994, COUNCIL ON FOREIGN RELATIONS (Dec. 5, 1994), <http://www.cfr.org/nonproliferation-arms-control-and-disarmament/budapest-memorandums-security-assurances-1994/p32484>.

98. *See* Giuliani, *supra* note 84, at 3.

Soviet republics with a nuclear weapons infrastructure.⁹⁹ Since the Budapest Memorandum's very basis was an "explicit Russian guarantee" of Ukraine's territorial integrity, it has been referred to by multiple world leaders whence condemning Russia's actions in the Crimea.¹⁰⁰ The agreement called for parties to seek guidance from the UN Security Council to provide assistance if "Ukraine should become a victim of an act of aggression;" however, this is clearly an ineffective solution given Moscow's position as a veto-wielding permanent member of the Security Council.¹⁰¹ Russia has blamed the US for violating this agreement by instigating the Euromaidan "coup" in Ukraine, and has accused Washington, without evidence, of arming and funding the opposition to Yanukovych.¹⁰² However, in bypassing UN Security Council permission and annexing sovereign Ukraine territory, Russia's actions constituted a violation of the Budapest Memorandum's main tenets.

In 1996, Russia joined the forty-seven nation Council of Europe, a body that governs several international courts and assemblies, such as the European Court of Human Rights.¹⁰³ At that time, it became a party to the Statute of the Council of Europe. The organization was founded in 1949, by the Treaty of London, with the goal of unifying European States to discuss political relations and promote fundamental principles of human rights and international law.¹⁰⁴ The Parliamentary Assembly of the Council of Europe (PACE) is made up of representatives of member states' parliaments and a Council of Foreign Ministers. Since its formation, the Council of Europe has passed over 200 legally binding European treaties and conventions.¹⁰⁵ In January 2015, the Parliamentary Assembly suspended Russia from participation in the Assembly's bodies, citing their violation of the Statute of the Council of Europe and declaring the annexation of Crimea to be an illegal violation of international law.¹⁰⁶ The Assembly referred to the previously discussed UN Charter, the

99. See Budapest Memorandums on Security Assurances, 1994, *supra* note 93

100. Stephen Chase & Mark MacKinnon, *Harper leads charge to expel Russia from G8, ramp up sanctions*, THE GLOBE & MAIL (Mar. 24, 2014), <http://www.theglobeandmail.com/news/politics/harper-leads-charge-to-expel-russia-from-g8-ramp-up-sanctions/article17631725>.

101. See Budapest Memorandums on Security Assurances, 1994, *supra* note 93.

102. See Andrew Higgins & Peter Baker, *Russia Claims U.S. Is Meddling Over Ukraine*, N.Y. TIMES (Feb. 6, 2014), http://www.nytimes.com/2014/02/07/world/europe/ukraine.html?_r=0.

103. Luke Harding, *Russia delegation suspended from Council of Europe over Crimea*, THE GUARDIAN (Apr. 10, 2014), <http://www.theguardian.com/world/2014/apr/10/russia-suspended-council-europe-crimea-ukraine>.

104. *Council of Europe*, CIVITAS (2014), <http://www.civitas.org.uk/eufacts/FSINST/IN7.php>.

105. *Id.*

106. See Giuliani, *supra* note 84, at 2.

Helsinki Accords, and the commitments made to the organization when Russia joined in 1996.¹⁰⁷

In 1997, Russia and Ukraine agreed to enter into two bilateral treaties dealing with another legacy of the Soviet breakup – the disposition of the Black Sea Fleet that was part of the Soviet Navy and based in Crimea.¹⁰⁸ The first treaty Moscow and Kiev signed was the ‘Treaty of Friendship, Cooperation, and Partnership between the Ukraine and the Russia Federation.’ Article 2 articulated “respect [of] each other’s territorial integrity” and the “inviolability of the borders” between them.¹⁰⁹ Later that year, the ‘Partition Treaty on the Status and Conditions of the Black Sea Fleet’ was signed, emphasizing the respect of each State’s borders, including an explicit statement that “Crimea is legally and territorially a sovereign part of Ukraine.”¹¹⁰ In return, Ukraine allowed Russia to lease one the largest operational naval bases in the world in the port city Sevastopol (renewed in 2010 to last until 2042).¹¹¹ The treaty allowed Russia to maintain up to 25,000 troops, 132 armored combat vehicles, and 24 pieces of artillery at the facilities on the Crimean base.¹¹²

However, there were also crucial limitations on Russian military behavior. The military forces could only operate “beyond their deployment sites” after coordinating with Ukraine’s administrative agencies.¹¹³ Also, the military forces had to “respect the sovereignty of Ukraine, honor its legislation, and preclude interference in the internal affairs of Ukraine.”¹¹⁴ One week *after* the annexation of Crimea, Putin submitted proposals to the State Duma terminating the legal effect of several Russo-Ukrainian agreements, including this treaty.¹¹⁵ Russia’s actions appear to be in direct violation of the 1997 treaty, as Moscow deployed the Sevastopol-based troops to seize control of crucial Crimean territory on the eve of a political referendum.¹¹⁶

107. *Id.*

108. See Tyler Felgenhauer, *Ukraine, Russia, and the Black Sea Fleet Accords*, DEF. TECHNICAL INFO. CENTER at 1 (Feb. 26, 1999), <http://dtic.mil/dtic/tr/fulltext/u2/a360381.pdf>.

109. See Kimball, *supra* note 82.

110. See Felgenhauer, *supra* note 102.

111. See Kimball, *supra* note 82.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Putin submits proposals on denouncing some Russia-Ukraine agreements on Black Sea Fleet*, TASS (Mar. 28, 2014), <http://tass.ru/en/russia/725725>.

116. Michael Kofman & Matthew Rojansky, *A Closer Look at Russia’s “Hybrid War”*, KENNAN CABLE (Apr. 2015), <https://www.wilsoncenter.org/sites/default/files/7-KENNAN%20CABLE-ROJANSKY%20KOFMAN.pdf>.

E. Domestic Constitutions

The Constitution of Ukraine makes explicit references to the territorial sovereignty of Crimea, the process for referendums of a “local character,” and the lawful process for proposed changes to border of Ukraine’s territory.¹¹⁷ Four main articles were violated by the government of Crimea in conducting a referendum to determine Ukraine’s territorial boundaries.

Chapter XI of the Constitution addresses the territorial structure of Ukraine. Article 134 states that the “Autonomous Republic of Crimea is an inseparable constituent part of Ukraine.”¹¹⁸ Article 135 discusses the Constitution of the Autonomous Republic of Crimea, and dictates that it “shall not contradict the Constitution and the laws of Ukraine.”¹¹⁹ Under Article 138, the Autonomous Republic of Crimea was within its rights to organize and conduct a local referendum.¹²⁰ However, under Article 73, any issues that involve “altering the territory of Ukraine are exclusively solved by an All-Ukrainian referendum.”¹²¹ Article 157 prohibits amendments to the Constitution that violate the “territorial indivisibility” of Ukraine.¹²² When the issue was submitted to the Constitutional Court of Ukraine, they affirmed that only an all-Ukrainian referendum could address a change to State boundaries.¹²³ The Venice Commission of the Council of Europe considered the referendum in an opinion, and held that the Ukrainian Constitution clearly prohibited a local referendum from altering its territory.¹²⁴ Thus, the March 2014 referendum to break away from the Ukraine violated four main tenants of the Ukrainian Constitution, confirmed in both State Constitutional Court and an advisory body that specializes in constitutional law.

The Constitution of the Autonomous Republic of Crimea was also violated when a local referendum was conducted in a manner inconsistent with the Constitution of Ukraine. Under Article 28, all statutory acts passed in the Autonomous Republic of Crimea must conform to the Constitution of Ukraine.¹²⁵ The four Articles that were discussed above were all in direct contradiction to the actions taken by the government of

117. See Grant, *supra* note 1, at 16.

118. UKR. CONST. art. 134, <http://www.infoukes.com/history/constitution/index-en.html#r9>.

119. *Id.* art. 135.

120. *Id.* at Ch. X Art. 138.

121. *Id.* at Ch. III Art. 73.

122. *Id.* at Ch. XIII Art. 157.

123. See Grant, *supra* note 1, at 16-17.

124. *Id.* at 17.

125. *Venice Commission Opinion No. 762* (2014) at 9 (Mar. 21, 2014), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)002-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)002-e).

Crimea. Because it was outside of the local government's scope of authority to violate the Ukrainian Constitution, the referendum to change Ukraine's boundaries violated the Constitution of the Autonomous Republic of Crimea.¹²⁶

Russia's Constitution had dictated since 2001 that the procedure for admitting a new subject to the Russian Federation was based on a mutual accord between the Russian Federation and the relevant State, had to take place pursuant to an international treaty between the two countries, and be initiated by a request from the foreign State.¹²⁷ From the way the Constitution was worded, it would have been problematic to allow Crimea to accede to the Russian Federation as it was not recognized as an independent State and the request was not initiated by Ukraine. However, on February 28, 2014, a bill was introduced to the State Duma, *On Amending the Federal Constitutional Law on the Procedure of Admission to the Russian Federation and Creation of a New Subject within the Russian Federation*.¹²⁸ The key amendment within the bill removed the requirement of "mutual accord" between the Russian Federation and the foreign state and the conclusion of an international treaty between two states.¹²⁹ Once implemented, a foreign State's admission would be carried out solely on the basis of the constitutional law of the Russian Federation.¹³⁰ Keep in mind, this law was submitted as Russian military forces are being deployed throughout the territory of Crimea. Hence, it appears the bill was submitted in a direct attempt to circumvent existing constitutional barriers in anticipation of the annexation process.

Yet, under Art. 15(4) of Russia's Constitution, universally recognized norms of international law and international treaties supersede any Russian Federation law that may be contradictory.¹³¹ Accordingly, a domestic law voiding the legal process for territorial acquisitions based in prior treaty agreements between Ukraine and Russia would not be legitimate in light of its contradictory nature to standing international law. The Constitution of Ukraine, the Constitution of the Autonomous Republic of Crimea, and the Constitution of the Russian Federation until late February, 2014 (and possibly after), were thus

126. *Id.*

127. *Venice Commission Opinion No. 763* (2014), at 7 (Mar. 21, 2014), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)004-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)004-e).

128. *Id.*

129. *Id.* at 3.

130. *Id.* at 3.

131. KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION], <http://constitution.garant.ru/english>.

violated by both the Crimean and Russian government actions that resulted in Crimea's referendum to become a federal subject of Russia.

F. Russia's Legal Arguments

As a permanent member of the UN Security Council and a major international power, Russia has the ability to shape global interpretations of international law. Thus, it is significant to attempt to give credence to the legal rhetoric the Kremlin espoused for their actions in Crimea. Five of Putin's legal arguments will be analyzed in turn: (1) the historic right Russia maintains over Crimea allowed for a referendum to determine a legitimate vote for the "self-determination" of the Crimean people and thus was a valid act of unilateral secession;¹³² (2) the human rights of the ethno-Russian minority resident in Crimea were threatened by an oppressive nationalist regime;¹³³ (3) Russia's intervention was at the legal invitation of the illegally ousted President Yanukovych and the Prime Minister of the Autonomous Republic of Crimea;¹³⁴ (4) there was a fundamental change of circumstances (*rebus sic stantibus*) resulting from a radical military coup that triggered a reexamination of treaty obligations to Ukraine;¹³⁵ and (5) based on State practice embodied in the International Court of Justice (ICJ) Kosovo decision and recent Western actions in Iraq and Libya, the use of force in Crimea was legitimate.¹³⁶ While there is some basis in State practice for Russia's legal position, all five of these arguments will be shown to be of minimal legitimacy.

G. Self Determination and Secession

The first argument can be further dissected into two parts: that Russia's historical right to Crimea legitimized the use of force in aid of 'self-determination;' and that the act was thus a valid unilateral 'remedial secession.' The prohibition against the threat or use of force among States contains limited exceptions embodied in Article 51 of the UN

132. Grant, *supra* note 1, at 57.

133. *Id.* at 50.

134. See Roy Allison, *Russian 'deniable' intervention in Ukraine: how and why Russia broke the rules*, 90 INT'L AFF. 1255, 1264 (2014).

135. Boris N. Mamlyuk, *Mapping Developments in Ukraine from the Perspective of International Law*, CAMBRIDGE J. INT'L & COMP. L. (Mar. 12, 2014), <http://cjlcl.org.uk/2014/03/12/mapping-developments-ukraine-perspective-international-law>.

136. *Id.*; See also Valerie Pacer, *Vladimir Putin's justification for Russian action in Crimea undermines his previous arguments over Syria, Libya and Iraq*, THE LONDON SCH. OF ECON. & POL. SCI. (Mar. 11, 2014), <http://blogs.lse.ac.uk/europpblog/2014/03/11/vladimir-putins-justification-for-russian-action-in-crimea-undermines-his-previous-arguments-over-syria-libya-and-iraq>.

Charter, which recognizes the “inherent right of individual or collective self-defense.”¹³⁷ The right allows for a group of people to determine their own independent political, economic, social, and cultural status in limited scenarios. The two key elements to analyze are the actions of the incumbent State and the responses of the international community.¹³⁸ There are two sets of circumstances where the UN Charter dictates self-determination can entail a right for the people of a sovereign territory to establish a new State.¹³⁹

The first circumstance deals with decolonization regimes and was expressed through a series of UN General Assembly resolutions in 1960.¹⁴⁰ The resolutions declared the subjugation of colonial regimes to be a denial of fundamental human rights and allowed for a Non-Self Governing Territory to either declare independence as a State, freely associated with an independent State, or integrate with an independent State.¹⁴¹ However, this was limited to “colonial type” territories.¹⁴²

The other type of “self-determination” is the more controversial act of unilateral “remedial secession.”¹⁴³ This is a contested concept, and even if valid it is considered a right that can only be invoked if the “incumbent State committed a serious breach of its obligations to the community,” such as the South African system of apartheid, or the violation of human rights in Kosovo.¹⁴⁴ If the people of a territory are allowed to participate in government and are not being oppressed systematically, acts of secession are widely considered illegal.¹⁴⁵ In an advisory opinion by the Canadian Supreme Court on the secession of Quebec, the Court made clear that because the people of Quebec were not “denied meaningful access to government to pursue their political, economic, social and cultural development,” they did not enjoy a right under international law to effect unilateral secession.¹⁴⁶ The Quebec decision also recognized a process of negotiation required with the incumbent State before a valid act of separation can occur, to determine if the issue can be settled under a national process.¹⁴⁷

137. U.N. Charter, art. 51, <http://www.un.org/en/sections/un-charter/chapter-vii/index.html>.

138. Mamlyuk, *supra* note 131.

139. Grant, *supra* note 1, at 23-26.

140. *Id.* at 23.

141. *Id.* at 24.

142. *Id.*

143. *Id.* at 26.

144. *Id.* at 27.

145. Mamlyuk, *supra* note 131.

146. Gaiane Nuridzhanian, *Crimean Secession: No Right to Divorce*, CAMBRIDGE J. INT'L & COMP. L. (Mar. 9, 2014), <http://cjlcl.org.uk/2014/03/09/crimean-secession-right-divorce>.

147. *Id.*

According to the Organization for Security and Cooperation in Europe (OSCE), there was no military or human rights oppression perpetuated against the people of Crimea by the government in Kiev.¹⁴⁸ This position was confirmed in the April 2014 “Report on the Human Rights Situation in Ukraine” by the Office of the United Nations High Commissioner for Human Rights (OHCHR Report).¹⁴⁹ Additionally, Crimea is not considered a “colonized” territory.¹⁵⁰ After the UN Security Council conducted seven sessions on the situation in Crimea, Russia vetoed the draft resolution that urged countries not to recognize the results of the referendum.¹⁵¹ Subsequently, the UN General Assembly voted 100 to 11 with fifty-eight abstentions on a non-binding resolution with similar language to the Security Council’s draft, including language in favor of upholding the integrity of Ukraine’s borders and declaring the March 2014 referendum invalid.¹⁵²

The process of the referendum was itself of dubious legitimacy due to the substantial presence of armed pro-Russian forces replacing the normal government administration. According to the UN High Commissioner of Human Rights “the presence of paramilitary and so called self-defense groups as well as soldiers without insignia... was also not conducive to an environment in which the will of voters could be exercised freely.”¹⁵³ Constitutional referendums that hold enough significance as to determine State sovereignty are expected to be held in fair and monitored conditions. If Russia sought a truly legal international resolution to the process of accepting Crimea as a federal subject to its territory, the referendum would not have been conducted “in haste, in a period of public crisis, and in the absence of third party observation.”¹⁵⁴ Accordingly, this does not appear to have been a valid act of ‘self determination’ by Crimea under international law.

148. *Developing Situation in Crimea alarming, says OSCE High Commissioner on National Minorities*, OSCE.ORG (Mar. 6, 2014), <http://www.osce.org/hcnm/116180>.

149. Office of the United Nations High Commissioner for Human Rights, *Report on the human rights situation in Ukraine* (Apr. 15, 2014), www.ohchr.org/Documents/Countries/UA/Ukraine_Report_15April2014.doc.

150. Grant, *supra* note 1, at 25.

151. *Backing Ukraine’s territorial integrity, UN Assembly declares Crimea referendum invalid*, UN NEWS CENTRE (Mar. 27, 2014), <http://www.un.org/apps/news/story.asp?NewsID=47443#.WI6A0LYrLeR>.

152. *Id.*

153. Office of the United Nations High Commissioner for Human Rights, *supra* note 144, at 4.

154. Grant, *supra* note 1, at 57.

H. Human Rights

Another popular Russian argument was based on the protection of co-ethnic Russians in Ukraine. In response to the Kiev regime change, Putin stated that “those who opposed the coup were immediately threatened with repression. Naturally, the first in line here was Crimea...we could not abandon Crimea and its residents in distress.”¹⁵⁵ Russian UN representative Vitaly Churkin asserted that “extremists in Ukraine must be prevented from taking control of the situation through illegitimate means, the use of violence and open terror.”¹⁵⁶ However, as stated above, according to both the OSCE and the OHCHR Report, there has been little documented evidence of any form of oppression of the Crimean Russian ethno-linguist population.¹⁵⁷ One example Russia cited occurred in the aftermath of President Yanukovych’s escape from Ukraine. The Ukrainian Parliament sought to repeal the 2012 language law that permitted Ukrainian regions to make Russia an official second language. However, a controversy over language rights does not seem to be the case for an armed humanitarian intervention, particularly in light of the principles of necessity and proportionality required for such a use of force.¹⁵⁸ Moreover, the acting Ukraine President Turchynov declined to sign the act or approve of the Parliament’s decision to repeal the language law.¹⁵⁹

I. Intervention by Invitation

Moscow’s argument that intervention in Crimea was at the legal invitation of both President Yanukovych and Prime Minister of Crimea Sergey Aksyonov is also undermined by governing international law. On March 3, 2014 Russia submitted a statement to the UN Security Council, allegedly made by Yanukovych, requesting formal military aid from the Russian Federation to help restore law and order and protect the people of Ukraine in the aftermath of the “illegal seizure of power in Kyiv.”¹⁶⁰

155. *Transcript: Putin says Russia will protect the rights of Russians abroad*, THE WASH. POST (Mar. 18, 2014), https://www.washingtonpost.com/world/transcript-putin-says-russia-will-protect-the-rights-of-russians-abroad/2014/03/18/432a1e60-ae99-11e3-a49e-76adc9210f19_story.html.

156. Allison, *supra* note 130, at 1262.

157. Office of the United Nations High Commissioner for Human Rights, *supra* note 144, at 21. *See also Developing Situation in Crimea alarming, says OSCE High Commissioner on National Minorities*, *supra* note 143.

158. Allison, *supra* note 130.

159. *See* Antonello Tancredi, *The Russian annexation of the Crimea: questions relating to the use of force*, QUESTIONS OF INT’L L. (QIL) 5-34 (2014), <http://www.qil-qdi.org/the-russian-annexation-of-the-crimea-questions-relating-to-the-use-of-force>.

160. *See* Grant, *supra* note 1, at 50.

The statement goes on to explain that “safety and human rights are under threat” and that “people are being persecuted on political and linguistic grounds.”¹⁶¹ This requires an analysis of whether President Yanukovich or Sergey Aksyonov had the legal standing to request such aid, and whether the Ukrainian Constitution would allow it, even if the request was legitimate.

It is true that President Yanukovich’s sudden departure from Ukraine is perhaps of questionable legitimacy. While he did abandon office and record an official statement of resignation, upon reaching safety outside of Ukraine he retracted his resignation and declared the Parliament vote that ousted him illegal.¹⁶² Three hundred and twenty-eight members of the 450 seat parliament voted to remove Yanukovich, for reasons including his abandonment of his post and the high volume of deaths amassed in the Euromaidan protests.¹⁶³ However, the February 22, 2014 vote may not have been legal under constitutional guidelines that required a three-fourths majority (i.e., 338 votes) and a review by the Constitutional Court.¹⁶⁴ In any event, the constitutionality of his impeachment does not alone provide a basis for the use of military force in Crimea. Although the requirements for a government to issue a valid invitation to use force are not codified in international law, State practice and customary international law indicate that “effective control over a substantial area” is required for the inviting government.¹⁶⁵

International recognition is another factor to be considered, and Yanukovich’s claim of legitimacy rests purely on the recognition of the State that intervened. The majority of the international community recognizes the transitional government in Kiev.¹⁶⁶ Generally, it has been thought that recognition of the “intervening State alone usually cannot suffice to legalize or justify an intervention.”¹⁶⁷ This can be seen in UN General Assembly Resolution 44/240 denouncing the US intervention in Panama.¹⁶⁸ There, the US similarly tried to justify that its invitation to use force was at the behest of Guillermo Endara, who was only recognized by the US as the legitimate President of Panama and was in

161. *Id.*

162. Daisy Sindelar, *Was Yanukovich’s Ouster Constitutional?*, RADIO FREE EUR., (Feb. 23, 2014), <http://www.rferl.org/content/was-yanukovichs-ouster-constitutional/25274346.html>.

163. *Id.*

164. *Id.*

165. See Grant, *supra* note 1, at 51.

166. Tancredi, *supra* note 154, at 3; See also Harding, *supra* note 99.

167. Tancredi, *supra* note 154, at 3.

168. *Id.*

exile on a US military base.¹⁶⁹ It therefore appears that an invitation from a recognized interim government would be considered much more legitimate than the statements of a single deposed leader in exile recognized only by the intervening State.

There are some scholars who believe a government “in exile could in some limited circumstances validly invite foreign troops onto the territory of their State despite having been deprived of effective control.”¹⁷⁰ Such a case would require the sitting government to be recognized internationally as illegal.¹⁷¹ For example, the legitimate Government of Kuwait, while in exile, was not deprived of its right to request foreign assistance against Iraq as an aggressor in 1990.¹⁷² There, however, Kuwait’s government was recognized by a majority of the international community and the UN as the legitimate representative of its country.¹⁷³ In contrast, the transitional Kiev government was not a forceful imposition by an outside power nor has it been found to persistently violate human rights.¹⁷⁴ The majority of human rights violations found by the OHCHR Report, in fact, occurred under President Yanukvoych’s regime during the Euromaidan protests.¹⁷⁵ After the Kiev regime change, there was no widespread international support recognizing Yanukovych as the legitimate government authority.¹⁷⁶

The US was also quick to dismiss the legality of Sergey Aksyonov’s request for intervention, stating that “the prohibition of the use of force would be rendered moot were sub-national authorities able to unilaterally invite military intervention by a neighboring state.”¹⁷⁷ International law only recognizes the ability of regional governments to invite the use of military force in very limited situations, and in those situations the “author of an invitation...must be the highest available State organ in order to ensure that the state speaks with one voice.”¹⁷⁸ Further evidence of Aksyonov’s request being illegitimate can be found in the ICJ’s *Nicaragua* judgment. The court noted that “...it is difficult to see what would remain of the principle of non-intervention in international law if

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. See Office of the United Nations High Commissioner for Human Rights, *supra* note 144. See also *Developing Situation in Crimea alarming, says OSCE High Commissioner on National Minorities*, *supra* note 143.

176. See Harding, *supra* note 99.

177. See Allison, *supra* note 130.

178. See Tancredi, *supra* note 154.

intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition.”¹⁷⁹ This undermines any legitimacy of a regional government’s invitation to use force.

J. Coup d’état/ Rebus Sic Stantibus

Yet another popular Kremlin argument accuses the Euromaidan protests of being an illegal Western-backed *coup d’état* of the democratically elected regime under President Yanukovich.¹⁸⁰ Under this theory, Russia recognizes the fundamental change of circumstances, or *rebus sic stantibus*, provision articulated in Article 62 of the Vienna Convention on the Law of Treaties (VCLT) allowing for a reexamination of obligations rising from previously conducted treaties, accords, and international agreements between Russia and Ukraine.¹⁸¹ Putin claims that the US “helped train the nationalists, their armed groups in Western Ukraine...” and that the West “facilitated the armed coup.”¹⁸² Thus, the interim government was illegal and Yanukovich remained the legal president of Ukraine. The argument then follows that all Russian treaties with Ukraine were void since they had been conducted with prior legitimate putative State authorities, including the bilateral friendship treaties prohibiting violations of territorial sovereignty. The problem with this argument is that VCLT Art. 62(2) articulates that a “fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty (a) if the treaty establishes a boundary;...”¹⁸³ Thus, a fundamental change of circumstances argument could not void the validity of the Budapest Memorandum, Helsinki Final Act, the bilateral Treaty of Friendship, or the Black Sea Fleet agreement, all of which emphasize respect of Ukraine’s borders and territory.

K. Kosovo, Iraq, and Libya

Moscow has also referred to the ICJ decision regarding *Kosovo* and recent State practice in both Iraq and Libya as precedent for the March

179. *Id.*

180. See Alex Christoforou, *New Documentary Shows Kiev Coup through Putin’s Eyes*, RUSS. INSIDER (Mar. 16, 2015), <http://russia-insider.com/en/2015/03/15/4505>.

181. See Mamlyuk, *supra* note 131.

182. See Christoforou, *supra* note 175.

183. See Vienna Convention on the Law of Treaties, art. 62(2), May 23, 1969, 1155 U.N.T.S. 331.

2014 use of force resulting in the annexation of Crimea.¹⁸⁴ While the advisory opinion from the ICJ acknowledged Kosovo's declared independence from Serbia legal, it evaded the question of whether the Kosovo population could secede as a manifestation of their right to self-determination. Putin has stated that the 2010 ICJ opinion on *Kosovo* was "a very similar situation" to the events that unfolded in Crimea.¹⁸⁵ Like Crimea, Kosovo was an autonomous republic composed of a majority of citizens who belonged to an ethnic minority. The Kosovo Albanians feared Serbian oppression, as did (so the argument goes) ethnic Russians living in Crimea of the interim Kiev government.¹⁸⁶ Under further examination, however, differences between the situations are quite stark.

First, it should be noted that Russia vehemently opposed the recognition of Kosovo and the ICJ decision. Russia claimed the declaration of independence from Serbia violated the UN Charter ensuring the territorial integrity of member nations and any recognition of Kosovo supported separatism.¹⁸⁷ In fact, Russia issued a Written Statement in the *Kosovo Advisory Proceedings*, as follows:

"[T]he Russian Federation is of the view that [international law] may be construed as authorizing secession under certain conditions. However, those conditions should be limited to truly extreme circumstances, such as an outright attack by the parent State, threatening the very existence of the people in question. Otherwise, all efforts should be taken in order to settle the tension between the parent State and the ethnic community concerned within the framework of the existing State."¹⁸⁸

It does not appear Russia took all efforts to "settle the tension between the parent State and the ethnic community" in Crimea, as they rushed to conduct a referendum in the immediate aftermath of regime change without counseling the UN Security Council or other international governing bodies.¹⁸⁹ The argument embracing territorial integrity of UN

184. Putin, *supra* note 91.

185. See Ilya Somin, *Why the Kosovo "precedent" does not justify Russia's annexation of Crimea*, WASH. POST (Mar. 24, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/24/crimea-kosovo-and-false-moral-equivalency>.

186. See Daniel W. Drezner, *Putin's excuse for a referendum is wrong: Crimea isn't Kosovo – at all*, THE GUARDIAN (Mar. 17, 2014), <http://www.theguardian.com/commentisfree/2014/mar/17/putin-referendum-crimea-kosovo>.

187. See Steve Gutterman, *Russia Denounces Kosovo Declaration*, WASH. POST (Feb. 17, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/17/AR2008021700714.html>.

188. Anna Stepanowa, *International Law on Legality of the Crimea Secession*, BEYOND THE EU (Apr. 15, 2014), <http://beyondthe.eu/international-law-crimea-secession>.

189. *Id.*; Grant, *supra* note 1, at 57.

member nations and anti-separatism fly in the very face of the rhetoric Moscow uses to legitimize the separation of Crimea. Further, there has been little, if any, evidence of “truly extreme circumstances,” such as severe human rights abuses in Crimea, at least nowhere near the scale of what existed in Kosovo in the late 1990s.¹⁹⁰

Second, Crimea sought independence under the guise of following the Ukrainian Constitution, which explicitly prohibits any binding territory-altering referendum that was not held nation-wide.¹⁹¹ However, Kosovo was entitled under the 1974 constitution of Yugoslavia with the right to secession.¹⁹² For instance, “[t]his right was exercised in a 1992 referendum with a majority opting for secession and independence.”¹⁹³ In response, Serbia did not recognize the vote and a campaign of violence and persecution ensued.¹⁹⁴ From the time of NATO’s intervention in 1999, it took eight whole years for independence to be declared.¹⁹⁵ During that period, Kosovo was under the administration of the UN and negotiations for a resolution were both peaceful and internationally supervised.¹⁹⁶ Russia took a period of mere days and weeks to deploy stationed troops throughout Crimea, hold a dubious referendum under said military presence, and then formally annexed the territory.¹⁹⁷ The UN Security Council vote on the legitimacy of the referendum was then vetoed by Russia, and the General Assembly voted 100-11 denouncing the action.¹⁹⁸

Third, the human rights abuses perpetuated against the Kosovars by Serbia were well documented.¹⁹⁹ In 1998, the UN Security Council in Resolution 1199 acknowledged “excessive and indiscriminate use of force” by Serbia and the Yugoslav Army, resulting in “numerous civilian casualties” and the “displacement of over 230,000 persons from their

190. See generally Office of the United Nations High Commissioner for Human Rights, *supra* note 144; See also *Developing Situation in Crimea alarming, says OSCE High Commissioner on National Minorities*, *supra* note 143.

191. UKR. CONST., *supra* note 112, art. 73.

192. George Topouria, *Three Reasons Why Crimea Is Not Kosovo*, BEYOND THE EU (Mar. 17, 2014), <http://beyondthe.eu/crimea-definitely-not-kosovo>.

193. Topouria, *supra* note 187.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Backing Ukraine’s territorial integrity, UN Assembly declares Crimea referendum invalid*, UN NEWS CENTRE (Mar. 27, 2014), <http://www.un.org/apps/news/story.asp?NewsID=47443#.Vle6x9AqhAQ>.

199. IVANA NIZICH, YUGOSLAVIA: HUMAN RIGHTS ABUSES IN KOSOVO 1990-1992 (Oct. 1, 1992), <https://www.hrw.org/legacy/reports/1992/yugoslavia>.

homes.”²⁰⁰ Russia voted in favor of this resolution, as did other Western members of the Council.²⁰¹ However, there is neither evidence of numerous civilian casualties of the Crimean people perpetuated by the interim government in Kiev, nor evidence of the displacement of hundreds of thousands from their homes.²⁰² Thus, while on the surface the two conflicts may share some basic characteristics, they are in reality quite different. The Russian attempt to use Western support for Kosovo’s independence is contrary to not only Moscow’s views regarding the case at the time, but does not appear to hold up as valid precedent based on the principles the opinion set down.

Russia has also referred to the US invasion of Iraq in 2003 and the 2011 UN Security Council Resolution of 1973, which formed the basis for military intervention in the Libyan Civil War, to justify their actions.²⁰³ While these two conflicts were perhaps the most similar in their justifications to the conflict in Crimea, it is only because all three have been condemned as abuses of international law. The 2003 invasion of Iraq was perpetuated by the US without explicit approval of the UN Security Council, and was denounced as a violation of the UN Charter by then UN secretary general Kofi Annan.²⁰⁴ In March 2011, the UN Security Council approved a ‘no-fly zone’ over Libya and authorized ‘all necessary measures’ to protect civilians, with a vote of ten in favor to none against, with five abstaining (including Russia).²⁰⁵ Despite the concern for human rights in Libya, Putin called the resolution “flawed and inadequate,” because it allowed States to “take any action against a sovereign state.”²⁰⁶ At the time, it appeared he favored territorial sovereignty over humanitarian concerns.²⁰⁷ Yet when the argument is tailored to Crimea, Moscow appears to be comfortable with using the Western rhetoric it had decried just years ago. Perhaps, in the early 2000’s, it should have been foreseen that Western interventions under

200. S.C. Res. 1199, (Sept. 23, 1998), <http://www.aco.nato.int/resources/site7423/general/documents/unscr1199.pdf>.

201. *Id.*

202. Office of the United Nations High Commissioner for Human Rights, *supra* note 144. See also *Developing Situation in Crimea alarming, says OSCE High Commissioner on National Minorities*, *supra* note 143.

203. Putin, *Address at the Kremlin*, *supra* note 91.

204. Egen MacAskill & Julian Borger, *Iraq war was illegal and breached UN charter, says Annan*, THE GUARDIAN (Sept. 15, 2004), <http://www.theguardian.com/world/2004/sep/16/iraq.iraq>.

205. *Security Council Approves ‘No Fly Zone’ Over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions*, U.N. Doc. SC/10200 (Mar. 17, 2011), <https://www.un.org/press/en/2011/sc10200.doc.htm>.

206. Pacer, *supra* note 132.

207. *Id.*

dubious international law principles could have potential repercussions in the form of Russian mimicry.

While the foregoing two examples of State practice are a minimal basis for Russia bypassing UN support for use of force in Crimea, the majority of Moscow's legal rhetoric appears to be flawed. In light of the multitude of UN doctrines and international agreements that support the territorial sovereignty of Ukraine and undermine the legitimacy of Crimea's secession to Russia, combined with the minimal legitimacy shown to underscore Russia's central legal arguments justifying use of force, the conclusion appears to be clear. Russia's military deployment in the Autonomous Republic of Crimea in late February and early March 2014 was an illegal use of force, while the March referendum and ensuing annexation was an illegitimate political act and a violation of Ukraine's territorial sovereignty.

III. CONFLICT IN THE DONBAS

A. Background

On April 6, 2014, just weeks after the annexation, armed men seized administration and security-service buildings in Donetsk, Luhansk, and Kharkiv, the three capitals of Ukraine's eastern provinces.²⁰⁸ Within days, police and security-service buildings were overtaken by unidentified armed soldiers, local armed separatists, and regular civilians.²⁰⁹ As a result of the last three years of armed conflict between Ukraine's government forces and the separatist militias, the UN estimates there have been over 9,000 casualties and between 2 and 3.5 million people displaced.²¹⁰ Moreover, the fighting has seen violent peaks with quiet ceasefires, two failed peace agreements, and a multitude of accusations levied by both sides.

The style of conflict Russia has perpetuated has been referred to as a "hybrid war" in Ukraine, via the proxy separatist forces in Donetsk and Luhansk, commonly referred to as the Donbas region of Ukraine.²¹¹

208. *Boys from the blackstuff*, THE ECONOMIST (Apr. 19, 2014), <http://www.economist.com/news/briefing/21601048-government-kyiv-has-no-obvious-counters-russian-inspired-occupations-industrial>.

209. *Id.*

210. Adrian Bonenburger, *The War No One Notices in Ukraine*, THE NEW YORK TIMES (June 20, 2017) <https://www.nytimes.com/2017/06/20/opinion/ukraine-russia.html>; see also U.N. Report, *Escalation of hostilities has exacerbated civilian suffering*, OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS (March 15, 2017) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21383&LangID=E>.

211. Andrew Tilghman & Oriana Pawlyk, *U.S. vs. Russia: What a war would look like between the world's most feared militaries*, MILITARY TIMES (Oct. 5, 2015), <http://www.militarytimes.com/>

“Hybrid war” attempts to encapsulate a modern style of conflict, involving a mix of “non-state proxy fighters, heavy armor and artillery, drones, electronic warfare, and aggressive information operations” used by Russia to achieve tactical battlefield victories and broader political objectives.²¹² On December 1, 2015, NATO adopted a new hybrid warfare strategy in response to Russia’s actions in Crimea, but has yet to address the more violent, aggressive military action in the Donbas.²¹³

The term “hybrid warfare” does not necessarily represent a new ideology to Soviet or Russian foreign policy escapades. For instance, *maskirovka* was a staple of Soviet military doctrine with its principal features including the maintenance of plausible deniability, concealment of forces, disinformation, denial, and decoy actions to confuse the opponents’ ability to predict and respond to actions.²¹⁴ Additionally, the use of modern technology and strategy in connection with *maskirovka* has created a difficult to define style of conflict. This style of warfare was foreshadowed by Russia’s 2010 Military Doctrine and in the 2014 iteration. The doctrines include provisions for “integrated utilization of forces and resources of a non-military character,” “measures of information warfare in order to achieve political objectives,” “participation of irregular armed force elements and private military companies,” and the “use of indirect and asymmetric methods of operations.”²¹⁵ These tactical strategies presaged today’s use of the term “hybrid war,” while outlining a path for Russia to perpetuate a violent geopolitical crisis without the attachment of direct responsibility for instigating an international armed conflict.

While the conflict is most commonly characterized as a non-international armed conflict, this section will show that between August 2014 and January 2015, Russian involvement crossed the threshold of being an illegal use of force and initiated an international armed conflict.

²¹⁶ The situation in the Donbas is distinct from the situation in Crimea

story/military/2015/10/05/us-russia-vladimir-putin-syria-ukraine-american-military-plans/73147344.

212. *Id.*

213. Mark Rachkevych, *NATO adopts counter ‘hybrid warfare’ strategy, prompted by Russia’s asymmetry and hostility toward Ukraine*, KYIV POST (Dec. 1, 2015, 11:31 PM), <https://www.kyivpost.com/article/content/war-against-ukraine/nato-adopts-counter-hybrid-warfare-strategy-prompted-by-russias-asymmetric-hostility-toward-ukraine-403274.html>.

214. Pierre Vaux, *Provocations, Proxies and Plausible Deniability*, THE INTERPRETER (June 24, 2014), <http://www.interpretermag.com/provocations-proxies-and-plausible-deniability>.

215. Michael Kofman & Matthew Rojansky, *A Closer Look at Russia’s “Hybrid War”*, 7 KENNAN CABLE (Apr. 2015), <https://www.wilsoncenter.org/sites/default/files/7-KENNAN%20CABLE-ROJANSKY%20KOFMAN.pdf>.

216. *Red Cross officially declares Ukraine civil war*, *supra* note 5.

because the territory is larger, pro-Moscow support is not as widespread, and there are no major local Russian military hubs. Conversely, Crimea was a well-defined territory, contained a Russian military base which housed troops, and was made up of 77% Russian speaking citizens and 58% ethnic Russians.²¹⁷ The separatists only control portions of two Donbas *oblasts*, but neither in their entirety. The ethnic population is more diverse and there are no Russian bases in Ukraine's sovereign territory. Russia's documented and alleged military involvement in the Donbas will be analyzed below. This section will show that the conflict should be characterized as an International Armed Conflict between Russia and Ukraine with a parallel Non-International Armed Conflict between Ukraine and the pro-Russian separatists.

B. Turning Points of Russian Involvement

The Donbas separatist movement began as a combination of Ukrainian pro-Russian local activists and volunteer Russian militants active in the region.²¹⁸ Local leaders were younger men who had been active in Russian nationalist groups in eastern Ukraine.²¹⁹ Russian militants began arriving after the annexation of Crimea, and were often older, more experienced Russian military veterans who developed a working relationship with the younger radicals.²²⁰ For example, the Donetsk People's Republic was proclaimed in April 2014 by 'President' Aleksander Bordai, a Russian political consultant from Moscow, and his Defense Minister, Igor "Strelkgov" Girkin.²²¹ The EU believes that Girkin works for Russian military intelligence, GRU, and has ties to prior Russian military service in Chechnya, Serbia, and Transnistria. Girkin is now considered the commander-in-chief of both the DPR and LPR, and has claimed responsibility for igniting the separatist movement with his military unit in April 2014.²²² Russia believed that by providing

217. See Hashem Said, *Map: Russian language dominant in Crimea*, AL-JAZEERA (Mar. 15, 2014, 9:24 PM ET), <http://america.aljazeera.com/multimedia/2014/3/map-russian-the-dominantlanguageincrimea.html>.

218. See *Ukraine crisis: Key players in eastern unrest*, BBC NEWS (Aug. 28, 2014), <http://www.bbc.com/news/world-latin-america-27211501>.

219. *Id.*

220. *Id.*

221. See *Ukraine crisis: Key players in eastern unrest*, BBC NEWS (Aug. 28, 2014), <http://www.bbc.com/news/world-latin-america-27211501>.

222. See Anna Dolgov, *Russia's Igor Strelkov: I Am Responsible for War in Eastern Ukraine*, THE MOSCOW TIMES (Nov. 21, 2014), <http://www.themoscowtimes.com/news/article/russias-igor-strelkov-i-am-responsible-for-war-in-eastern-ukraine/511584.html>.

leadership, funding, and ammunition, local rebellions would thrive in destabilizing Kiev.²²³

In April and May 2014, the separatist operation saw early success while the Kiev government was still in transition.²²⁴ On May 25, 2014, elections were held and the newly-elected President Poroshenko was sworn in June 7, 2014.²²⁵ Throughout the summer, Poroshenko began to ramp up Ukraine's military operations against the separatists.²²⁶ Consequently, Ukraine forces found success against the ill-equipped separatist militias and by mid-August 2014 had nearly encircled the remaining separatist enclaves in Donetsk and Luhansk.²²⁷

At this point, the Kremlin stepped in to assist. The Donetsk People's Republic announced in August 2014 they had received 30 tanks, 120 armored vehicles, and 1,200 troops from across the Russian border.²²⁸ According to President Poroshenko and NATO satellite imagery, "columns of heavy artillery, huge loads of arms and regular Russian servicemen came to the territory of Ukraine from Russia through uncontrolled border areas."²²⁹ Yet Russia continued to deny any Russian military presence in the region.²³⁰

The bloodiest battle of 2014 was concluded on August 29 in the strategic city of Ilovaisk. Ukraine troops had successfully beaten back separatists in nearby areas, and the assault was supposed to be the final drive to secure the city, which would cut crucial supply lines between the rebels of Donetsk and Russia's border where support was flowing from.²³¹ There were approximately 100 separatists expected to remain in the city.²³² Several days into the assault, an unexpectedly forceful counter-

223. *See generally Id.*

224. *See generally Id.*

225. *See Timeline: Ukraine's political crisis*, AL JAZEERA (Sept. 19, 2014), <http://www.aljazeera.com/news/europe/2014/03/timeline-ukraine-political-crisis-201431143722854652.html>.

226. *Id.*

227. *See* Max Fisher, *30 tanks and 1,200 troops just crossed from Russia into Ukraine, according to the rebels*, VOX (Aug. 16, 2014), <http://www.vox.com/2014/8/16/6023605/30-tanks-and-1200-troops-just-crossed-from-russia-into-ukraine>.

228. *Id.*

229. *See* Michael R. Gordon, *Ukraine Leader Says 'Huge Loads of Arms' Pour in from Russia*, N.Y. TIMES (Aug. 28, 2014), <http://www.nytimes.com/2014/08/29/world/europe/ukraine-conflict.html>.

230. Melinda Haring, *Putin Cracks Down on U.S. Press Reporting Russian Involvement in Ukraine*, NEWSWEEK (Jun. 25, 2015), <http://www.newsweek.com/putin-cracks-down-us-press-reporting-russian-involvement-ukraine-346926>.

231. *See* Dan Peleschuk, *Ukraine is still at war – and its bloodiest battle isn't over*, THE WK. (Sept. 2, 2015), <http://theweek.com/articles/574972/ukraine-still-war—bloodiest-battle-isnt-over>.

232. *Id.*

attack shocked the Ukraine troops. Reports from the government forces show that 4,000 Russian infantry members had crossed the border, about half of which were heading to Ilovaisk.²³³ It was not a complete surprise, as Ukrainian forces had captured ten Russian paratroopers and a Russian tank throughout the course of the battle.²³⁴ However, the Russian forces and separatist rebels gradually surrounded the now-outnumbered Ukrainians, forcing a negotiation for safe passage back to Ukraine-held territory. While the content of these talks has been disputed, what followed from them has not. When the column of approximately four hundred Ukrainians waited to leave through a corridor outside the city, a rebel commander warned over radio communications that they would soon meet their deaths.²³⁵

As the Ukrainian troop convoy began to exit the city and reached an open field to the south, they came upon Russian tanks and buried artillery that began to fire upon them at will.²³⁶ Surviving Ukrainians were taken into Russian custody and passed to the rebels days later.²³⁷ Ukraine estimates that around 100 men were killed that day in the retreat. According to Ukraine's military prosecutor, 366 troops were killed in total in the Battle of Ilovaisk (a number thought to be conservative).²³⁸ Russia denies any direct involvement with the battle, and claimed the captured paratroops had crossed the border by accident.²³⁹

The Russian escalation prompted additional sanctions from the EU and spawned the Minsk Peace talks in early September, 2014. Representatives of the Ukrainian and Russian governments, separatist leaders, and a representative of the OSCE signed a ceasefire.²⁴⁰ Despite this, reports indicated continued heavy weaponry entering east Ukraine.²⁴¹ A military operation seizing Donetsk Airport from Ukrainian forces in December was indicative of the rising violence between the forces. In the middle of January 2015, a critical battle broke out for the

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *See 366 Ukrainian fighters killed in Battle for Ilovaisk last August: Military*, UKR. TODAY (Aug. 5, 2015), <http://uatoday.tv/politics/battle-for-ilovaisk-one-year-on-469594.html>.

239. *See Peleschuk, supra* note 222.

240. *See History of War in Ukraine*, UKR. UNDER ATTACK, <http://ukraineunderattack.org/en/history-of-conflict> (last visited Nov. 2015).

241. *See* Laura Smith-Spark, Diana Magnay & Reza Sayah, *Artillery barrages in southern Ukraine raise questions on ceasefire*, CNN.COM (Sept. 6, 2014), <http://www.cnn.com/2014/09/06/world/europe/ukraine-crisis>.

railway hub of Debaltseve that lies between Donetsk and Luhansk.²⁴² Following a substantial Russian resupply of forces, the separatists were able to defend the city against Ukrainian troops.²⁴³ The violent skirmishes inspired a second round of peace talks, Minsk II, which called for a ceasefire to come into effect on February 15, 2015.²⁴⁴ While the ceasefire brought relief to some eastern Ukraine frontlines, the DPR rebel leaders announced that it did not apply to Debaltseve, and continued their shelling of thousands of trapped government troops until they were able to retreat.²⁴⁵

While separatist soldiers did take part in the Battle of Debaltseve, documented evidence of Russian troops and powerful weaponry suggests both were pivotal factors in the fight.²⁴⁶ This included the 5th Tank Brigade from the Russian Ulan-Ude, Buryatia province and the 37th Motorized Infantry Brigade from Kyakhta, Buryatia.²⁴⁷ One soldier from the 5th Tank Brigade, Dorzhi Batomunkuyev, gave an interview with a Russian independent newspaper that contract soldiers from Kyakhta had joined him when crossing the border to fight in Debaltseve.²⁴⁸ Another Russia soldier, Bato Dambayev, trained with the 37th Motorized Infantry Brigade in the Russian Kuzminsky camp in December and January, crossed over the border with his brigade to fight battles in Debaltseve, and then returned home after the victory.²⁴⁹ A third Russian citizen and twenty-five year-old who has served multiple military terms with Russian forces, joined the separatists as a volunteer in 2014.²⁵⁰ In an interview with Radio Free Europe, he estimated that each separatist unit “has some 15 volunteers from Russia” fighting for it.²⁵¹ He also said that regular

242. See Karoun Demirjian, *Ukrainian Battalion's soldiers recall desperate run to safety*, WASH. POST (Feb. 18, 2015), https://www.washingtonpost.com/world/europe/these-ukrainian-soldiers-tell-a-vivid-story-of-escaping-rebel-noose/2015/02/18/8251fef6-b77a-11e4-bc30-a4e75503948a_story.html.

243. *Id.*

244. *Id.*

245. See Alec Luhn, *Fears for Ukraine's ceasefire as clashes with Russia-backed rebels intensify*, THE GUARDIAN (Feb. 15, 2015), <http://www.theguardian.com/world/2015/feb/14/ukraine-ceasefire-doubt-clashes-rebels-russia-rockets-shelling>.

246. Maksymilian Czuperski et al., *Hiding in Plain Sight: Putin's War in Ukraine*, THE ATLANTIC COUNCIL (Oct. 15, 2015), <http://www.atlanticcouncil.org/publications/reports/hiding-in-plain-sight-putin-s-war-in-ukraine-and-boris-nemtsov-s-putin-war>.

247. *Id.* See also Haring, *supra* note 225.

248. *Id.*

249. *Id.*

250. Nail Khisamiev & Merhat Sharipzhan, *Volunteer Rebel Sheds Light On Russian Military Involvement In Eastern Ukraine*, RADIO FREE EUR. (Jul. 22, 2015), <http://www.rferl.org/content/ukraine-russia-military-involvement-volunteer/27144747.html>.

251. *Id.*

Russian troops enter the Donbas for one week periods before leaving and being replaced by fresh forces.²⁵²

Russian weapons systems sighted in Debaltseve include the T-72B3 Tank and the KamAZ-5350 Grad rocket launcher.²⁵³ Other Russian manufactured arms that have ‘appeared’ in the hands of the separatist military included shoulder-launched surface-to-air missiles, anti-tank guided missiles, landmines, and certain small arms.²⁵⁴ The use of electronic warfare in Ukraine has also been effective; Russia has effectively jammed radar, GPS, and radio communications of the Ukraine government forces with sophisticated equipment.²⁵⁵

In late September 2015, the Obama administration made the decision to send counter-battery radar for missiles to Ukraine, as long-range Russian artillery was responsible for over 80% of Ukraine’s casualties.²⁵⁶ In early October, a positive meeting between French President Hollande, Ukraine President Poroshenko, German Chancellor Merkel, and President Putin resulted in the suspension of local elections in the DNR and LNR enclaves until January 2016, as well as the withdrawal of certain weaponry within fifteen kilometers from the line of contact.²⁵⁷ Putin was much more willing to cooperate than when the leaders had last met in January for the Minsk II talks in the midst of the Debaltseve violence.²⁵⁸

This article was written in the fall and winter of 2015, but the war in Donbas shows no signs of slowing down as of the three-year anniversary of Russia’s annexation of Crimea in March 2017. Ukrainian Foreign Minister Pavlo Klimkin testified before a U.S. Senate panel in March warning the Appropriations Committee of Russia’s hybrid warfare tactics.²⁵⁹ Klimkin declared that Moscow currently has 4,200 regular troops, 40,000 militants, over 400 tanks, and 1,000 artillery platforms located in Eastern Ukraine.²⁶⁰ After a sharp escalation of hostilities at the

252. *Id.*

253. *See* Czuperski, *supra* note 241, at 21.

254. *Id.* at 11.

255. *See* Joe Gould, *Electronic Warfare: What US Army Can Learn From Ukraine*, DEF. NEWS (Aug. 4, 2015), <http://www.defensenews.com/story/defense/policy-budget/warfare/2015/08/02/us-army-ukraine-russia-electronic-warfare/30913397>.

256. *See* John Herbst, *A Lull in the East*, AM. INT. (Oct. 30, 2015), <http://www.the-american-interest.com/2015/10/30/a-lull-in-the-east>.

257. *Id.*

258. *Id.*

259. *See* Robbie Gramer, *European Diplomats to Congress: For Our Sake, Don’t Cut Foreign Aid Funding*, FOREIGN POLICY, (March 8, 2017), <http://foreignpolicy.com/2017/03/08/nervous-europeans-want-more-u-s-funding-to-fend-off-russia-threat-trump-putin-relationship-nato-allies-eastern-europe-ukraine-baltic-states/>.

260. *Id.*

end of January and beginning of February 2017, the death total for the conflict has now reached nearly 10,000, with over 23,000 people injured.²⁶¹ This death total includes over 2,000 civilians.²⁶²

C. Law of Armed Conflict

There are two types of armed conflicts defined in international humanitarian law. The first is an international armed conflict (IAC), defined by the four Geneva Conventions of 1949 (except common Article 3) and 1977 Additional Protocol I.²⁶³ Common Article 2 applies the definition to an “Armed conflict between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” The International Committee for the Red Cross (ICRC) commentary on that provision explains that the article refers to any “difference arising between two States and leading to the intervention of armed forces is an armed conflict...even if one of the Parties denies the existence of a state of war.”²⁶⁴

Second, the main sources governing non-international armed conflicts (NIAC) are common Article 3 to the Geneva Conventions of 1949 and Article 1 of 1977’s Additional Protocol II.²⁶⁵ Common Article 3 applies to “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.”²⁶⁶ This encompasses military conflict between armed government forces and non-government groups, or between two such non-government groups. However, a “threshold of confrontation” must be reached to fall under this Article, including a level of intensity requiring the government’s use of military force against the insurgents, as opposed to mere police forces, and a level of organization within the command structure of the insurgents that enables the group to sustain military operations.²⁶⁷

Article 1 of Additional Protocol II adopts a slightly narrower definition of non-international armed conflict. The document applies to

261. See U.N. Report, *Escalation of hostilities has exacerbated civilian suffering*, OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS (March 15, 2017) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21383&LangID=E>.

262. *Id.*

263. See *Qualification of Armed Conflict*, RULE OF L. IN ARMED CONFLICTS PROJECT, http://www.geneva-academy.ch/RULAC/qualification_of_armed_conflict.php (last visited Dec. 2015).

264. See International Committee of the Red Cross Opinion Paper, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* (Mar. 2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

265. *Id.*

266. *Id.*

267. *Id.*

armed conflicts “which take place in the territory of a High Contracting party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations...”²⁶⁸ The definition is more restrictive because it requires an element of territorial control, and expressly applies to armed conflicts between State armed forces and dissident armed forces.

D. Application in the Donbas

While the ICRC has declared the conflict in the Donbas to be a NIAC, other international bodies such as Amnesty International have declared it to be an IAC between Russia and Ukraine.²⁶⁹ While the hybrid war strategy allows the Russian government to continue to deny its involvement in the conflict, under the laws of war the NIAC in eastern Ukraine appears to have escalated into a parallel IAC in August 2014 and January 2015.²⁷⁰

During the spring and summer of 2014, the conflict should have been characterized as a Protocol II NIAC. While the common Article 3 definition also applied because of the deployment of Ukraine’s military forces and the command structure and military hierarchy within the separatist forces, the Protocol II definition was better suited because of the territorial control the rebels maintained. They took control of both administration buildings and military installations, as well as strategic highways, railroads, and airports.²⁷¹ Their army was organized under a military hierarchy, with multiple battalions led by Russian military veterans such as the lead commander Igor Girkin.²⁷² It therefore appears that the elements of territorial control and organized dissident armed forces satisfied a Protocol II definition.

The August 2014 and February 2015 resupply of weapons, ammunition, military support vehicles, and troops combined with the available evidence from the Battle of Illovaisk and Debaltseve escalated the conflict to an IAC. The threshold for IAC is relatively low, and the inclusion or presence of any Russian soldiers fighting with or leading

268. *Id.*

269. See *Ukraine: Mounting evidence of war crimes and Russian involvement*, AMNESTY INT’L (Sept. 7, 2014), <https://www.amnesty.org/en/latest/news/2014/09/ukraine-mounting-evidence-war-crimes-and-russian-involvement>. See also *Red Cross officially declares Ukraine civil war*, *supra* note 5.

270. See Haring, *supra* note 221.

271. See generally Czuperski, *supra* note 241.

272. *Id.* See generally also Dolgov, *supra* note 217.

rebels against the Ukrainian government forces would create a parallel IAC between Ukraine and Russia, in addition to the NIAC between Ukraine and the rebels.²⁷³ The common Article 2 definition would apply if there was any evidence of Russian soldiers present and fighting in the conflict, as the definition includes intervention of “*members of the armed forces*” of another State (emphasis added).²⁷⁴ As shown through interviews and investigative reports, there is ample evidence that members of the Russian armed forces are participating in the armed conflict.

In the case against Bosnian-Serb Dusko Tadic, the International Criminal Tribunal ruled that an IAC would exist if one State exercised “overall control” over forces that go beyond the “mere financing and equipping of such forces” to include “participation in the planning and supervision of military operations.”²⁷⁵ There is ample evidence of Russia providing arms, troops and financial assistance to the rebels, however little evidence exists to determine whether Russian authorities are directly planning operations.²⁷⁶ Yet Putin has shown that he maintains heavy influence over the separatist leaders, and has wielded this influence to postpone local elections and withdraw certain weaponry.²⁷⁷ While this does not conclusively determine any military operational planning, it does support an inference of control that goes beyond mere financing and equipping of the separatist forces. Someone high up the chain of Russian military command had to order the troop movements of the 5th Tank Brigade, the 37th Motorized Infantry Brigade, and others from the Russian military camp Kuzminsky; and it would follow that whomever did was participating ‘in the planning and supervision of military operations.’

Under Article 2(4) of the UN Charter and guiding principles of the 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the*

273. *International Armed Conflict Classification*, RULAC Geneva Academy (July 13, 2017) <http://www.rulac.org/classification/international-armed-conflict#collapseIaccord>; Ilya Nuzov & Anne Quintin, *The Case of Russia's Detention of Ukrainian Military Pilot Savchenko under IHL*, EUR. J. INT'L. L.: TALK! (Mar. 3, 2015), <http://www.ejiltalk.org/the-case-of-russias-detention-of-ukrainian-military-pilot-savchenko-under-ihl>.

274. See International Committee of the Red Cross Opinion Paper, *supra* note 256.

275. *Id.*

276. See *Ukraine: Mounting evidence of war crimes and Russian involvement*, *supra* note 261. See also Jonathon Ferguson & N.R. Jenzen-Jones, *Raising Red Flags: An Examination of Arms & Munitions in the Ongoing Conflict in Ukraine*, ARMAMENT RES. SERVICES (Nov. 2014), <http://armamentresearch.com/Uploads/Research%20Report%20No.%203%20-%20Raising%20Red%20Flags.pdf>.

277. See Herbst, *supra* note 238.

Charter of the United Nations, these actions also constitute an illegal use of force that is contrary to peaceful values indoctrinated in international law. Article 2(4)'s prohibition of the "use of force against...the political independence" of another State was further clarified in the 1970 non-binding resolution, which prohibited "any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State."²⁷⁸ The combination of Russian soldiers, advanced weaponry, and military equipment that has been documented in eastern Ukraine appears to be an attempt to disrupt the national unity and political independence of Ukraine.²⁷⁹ While the postponing of the separatist elections was an important diplomatic achievement, it has created a frozen quagmire in the Donbas that Putin is counting on to destabilize Poroshenko's pro-Western regime. The conflict has made it impossible for the Poroshenko administration to effectively govern, particularly in a country that was already in need of economic and regulatory reform.

IV. CONCLUSION

While these conflicts are quite distinct in nature, they both reinforce a theme of Russia interpreting international law however it sees fit, manipulating and ignoring whichever tenants may be inconvenient to their national security strategy without any fear of legal consequence or repercussion. Although Western democracies have not been models of excellence in following international law while waging complex wars against supranational terrorist regimes, this does not give Putin legal carte blanche to 'fix' what he considers "the greatest geopolitical catastrophe" of the 20th century: the demise of the Soviet Union.²⁸⁰ As Russia continues to display a willingness to magnify its military influence throughout regions of global significance, it is vital for the West to continue to protect the Baltic, Eastern Europe, and in particular, Ukraine's democratic interest and desire for integration and reform in the face of perpetual Kremlin interference.

The deployment of a combination of unmarked Russian military throughout the Crimean peninsula on the eve of an illegally proffered political referendum amounts to several violations of governing

278. UN Charter, art. 2, para. 4, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>. See also Sayapin, *supra* note 69, at 23.

279. See *Ukraine: Mounting evidence of war crimes and Russian involvement*, *supra* note 261. See also Czuperski, *supra* note 241.

280. See *Putin: Soviet collapse a 'genuine tragedy'*, ASSOCIATED PRESS (Mar. 25, 2005, 2:30 PM ET), http://www.nbcnews.com/id/7632057/ns/world_news/t/putin-soviet-collapse-genuine-tragedy/#.VnIrm9B5xAR.

international treaties, agreements, constitutions, and customary international law principles. The Kremlin's current transparency about the military operation in Crimea stems from its success, yet due to the uncertain future of the violent overthrow of Ukraine's Donbas by Russian troops and separatist forces, there is much less transparency and more room for plausible deniability from Russia. Yet through the knowledge gathered from journalists on the ground and supranational organizations, it is apparent that the conflict is no longer solely a non-international armed conflict. Russia has become an aggressor, perpetuating an international armed conflict against Ukraine through a mixture of strategic 21st century tactics, *maskirovka*, and hybrid warfare. Europe must continue to strive to protect those who yearn for peaceful reform and democracy in Ukraine, while allowing it to retain a national culture that has only been allowed to flourish as a free nation so ephemerally in its rich, complex, and viciously violent history.